76-1317

IN THE

Supreme Court of the United States

October Term, 1976
No.

CHARLES MERRILL MOUNT,

Plaintiff,

v.

THE BOSTON ATHENAEUM,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Plaintiff, CHARLES MERRILL MOUNT, appearing in his own behalf, petitions for writ of certiorari to review the judgment of the United States Court of Appeals

for the First Circuit in this case.

OPINIONS BELOW

By Orders of the District and Circuit Courts the opinions in this case are not reported. Plaintiff petitioned the District Court for the District of Massachusetts to redress notorious libels which defendant THE BOSTON ATHENAEUM maliciously had created and which had no basis in fact whatsoever. These libels were to the effect that plaintiff had forged with his own hands masses of paintings attributed to the famous American artist JOHN SINGER SARGENT (1856-1925). The factual issue of the litigation therefore is whether plaintiff did forge with his own hands

such paintings, and the legal issue is whether there is Constitutional privilege arising because it can be shown that at any time prior to the publication of the libels plaintiff had "thrust himself into the vortex of this public issue" (Elmer Gertz v. Robert Welch, Inc., U.S., 41 L Ed 2nd 789). The answer to both questions is negative.

The malicious and reckless nature of the libels is best judged by the fact that in proceedings before the District Court defendant never undertook to justify them or produce evidence which would support its widely disseminated allegations of criminal acts. The matters are admittedly false. The only question for this court to examine therefore is whether

plaintiff has right to recovery for his damages or whether Constitutional privilege blocks this.

By decision dated July 25, 1975 (Appendix A) the District Court dismissed plaintiff's complaint on the ground that he was a public figure. Plaintiff had taken no part in any controversy preceding publication of the libel, and, indeed, for many years had been resident in Europe and unaware that such controversy existed in this country or in Massachusetts. The decision deprived plaintiff of right to recovery of actual damages for libel.

The rule of the Common Law is "that the 'public figure' must have achieved that stature before there can be any privilege arising out of it, and that the

defendant, by directing attention to one who is obscure and unknown, cannot himself create a public figure, or make him news."* The courts have carried this over under the Constitution, and in Elmer Gertz (supra) Justice Powell refined the rule still further by proscribing a specific test. "It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." The District Court nonetheless failed to look for participation in the particular controversy giving rise to the defamation. Had it

*The Law of Torts, William L. Prosser, Fourth Edition, 1971, page 827.

done so it would have discovered that none existed. Plaintiff at all times was wholly unaware of the controversy, and, at the time of publication, had been living for more than a decade in Europe where knowledge of it never reached him. In Justice Powell's words: "[Plaintiff] plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an effort to influence its outcome.". Plaintiff cannot have been a public figure with reference to the issue involved in the defamations.

Plaintiff made appeal of the District Court decision to the United States Court of Appeals for the First Circuit, which, February 25, 1976, affirmed the

finding of the District Court (Appendix B). In its turn the Circuit Court also failed to touch on the essential issue, which was that plaintiff at all times was unaware of the controversy until it burst on him from the front page of newspapers in the form of the published libels complained of. Though the allegations of criminal acts made against plaintiff admittedly are false and unsupported by evidence of any nature, again he was deprived of the recovery due him.

The opinions delivered below indicate that plaintiff twice had been denied the right to recovery for actual damages which by the standard well known in Common Law, and re-affirmed and refined in Elmer Gertz (supra), should be his.

Plaintiff has been forced to endure years deprived of income due to action of the libel while also denied redress. Some significance may be found in the fact that the District Court and Circuit Court are located in Boston, city wherein the defendant, THE BOSTON ATHENAEUM, is a privately maintained bastion of privilege serving the most exclusive of this nation's Mayflower descendants. Question must arise whether, given the bizarre nature of the opinions delivered, plaintiff has not deliberately been denied the ordinary standards commonly applied to other libel plaintiffs because defendant is a privileged institution, founded in 1808, which maintains close ties inside the most privileged sector of Boston society. Plaintiff

believes he has been denied equal rights and due process guaranteed to all citizens of the United States by the Fourth, Fifth, and Fourteenth Amendments.

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked on the basis of its power to review claims which arise in District Courts through diversity jurisdiction, and because the standard set forth in the guiding decision Elmer Gertz v. Robert Welch, Inc. (U.S., 41 L Ed 2d 789) has been disregarded by the District and Circuit Courts. This is a diversity case for libel in which the facts presented by plaintiff have not been challenged

and the defendant thereby has waived contest of factual issues. The only question is whether plaintiff is a private person and can recover as such, or whether, in disregard of Gertz v. Welch (supra), he can be declared to be a public figure as was done by the District Court July 25, 1975, and the Circuit Court February 25, 1976, and denied recovery on that basis. In subsidiary fashion the further question arises whether plaintiff was not singled out by the District Court and Circuit Court to be denied the standards applied to all other plaintiffs in diversity libel actions by Common Law and Gertz v. Welch, and, if so, whether he has not been denied his Constitutional rights to due

process and "the equal protection of the laws" written into the Fourth, Fifth, and Fourteenth Amendments. Timely notice of appeal to the United States Supreme Court was filed February 27, 1976, with Dana H. Gallup, Clerk of the United States Court of Appeals for the First Circuit (Appendix C).

QUESTIONS PRESENTED

This appeal presents the considerable Federal question whether this libel plaintiff, an obscure artist and historian without general fame, who is a native-born citizen of New York, should not be granted the same protection as other citizens of this country from destruction

through libel of his quiet and honorable career. The basic question is whether the District and Appeal Courts, both of them located at Boston, shall employ their local prejudices in favor of a venerable but decayed institution to exempt one libel plaintiff from the same protection given every other citizen by the general body of laws enacted in this country. By its decision Elmer Gertz v. Robert Welch, Inc. (U.S., 41 L Ed 2d 789) the United States Supreme Court enunciated standards whereby a libel plaintiff shall be deemed a public figure or a private party. This is determined "by the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." By this

decision Justice Powell affirmed the older Common Law rule "that the 'public figure' must have achieved that stature before there can be any privilege arising out of it, and that the defendant, by directing attention to one who is obscure and unknown, cannot himself create a public figure or make him news." (THE LAW OF TORTS, William L. Prosser, Fourth Edition, 1971, page 827.)

The plaintiff herein concerned must not be excepted from the general standards of law in the United States. Yet such exception seems to have been made deliberately and by intent for benefit of THE BOSTON ATHENAEUM. In his District Court decision Justice Tauro employed seven lines of the libelous article itself,

which he presented as an indented paragraph, as basis on which to find plaintiff a public figure. This was done despite the submissions made to the court by plaintiff, who had shown, at some length, that the quoted article was a tissue of deliberate falsehoods. Defendant never had attempted to support even one allegation made therein. Only Justice Tauro found the article a responsible statement.

In its turn the Circuit Court employed no standard whatsoever, but made arbitrary statement: "Plaintiff was a public figure within the limited range of issues including the authenticity of the works of John Singer Sargent" (emphasis supplied) an assertion factually unsupported, contrary

to Common Law, and not relevant to the issue. The specific controversy by which it must be determined plaintiff is or is not a public figure does not concern "the authenticity of the works of John Singer Sargent," but whether plaintiff forged such pictures with his own hands. The record before the courts demonstrated conclusively that plaintiff never took part in any controversy relevant to whether he had forged pictures with his own hands. Plaintiff was unaware such controversy existed.

In a footnote on page 4 the Circuit Court attempts to rely on a doubtful collateral estoppel arising from an action in New York to which THE BOSTON ATHENAEUM was not a party. "Although plaintiff is

attempting to collaterally attack the New York judgment, it will have a collateral estoppel effect in this proceeding as long as it remains unreversed by proper tribunal." Plaintiff maintains contrarily that the New York judgment has no bearing because THE BOSTON ATHENAEUM was neither a party nor a privy to that proceeding, and one party to litigation cannot be bound thereby alone. However, it must also be borne in mind that plaintiff's prayer to the Appellate Division of the Supreme Court of the State of New York that he be permitted to seek its review in forma pauperis was denied December 31, 1975. Justice was denied plaintiff for no better reason than that the very libels complained of had made him

too impoverished to merit justice.

The factual issue of the District Court proceeding was whether plaintiff had forged with his own hands paintings attributed to the artist John Singer Sargent (1856-1925). Plaintiff had engaged in no public controversy on this issue. Plaintiff was unaware that the issue, which was a synthetically contrived one, had been created by THE BOSTON ATHENAEUM. With respect to this issue plaintiff was not a "public figure" before publication of the libels because he did not take part in the "particular controversy giving rise to the defamation." In the terms cited by Justice Powell in Gertz v. Welch, plaintiff "plainly did not thrust himself into the vortex of

this public issue, nor did he engage the public's attention in an attempt to influence its outcome."

The Circuit Court discarded these standards set forth for it in Gertz v. Welch and in the footnote to page 4 of its decision makes arbitrary statement without reference to any criteria at all:

> The record contains ample support for the conclusion that plaintiff is a public figure within the art world; indeed, his own admissions in his affidavits may provide a sufficient basis for this conclusion.

This is deliberately vague, for plaintiff's affidavits nowhere indicate that he had "thrust himself into the vortex of this public issue" - bearing in mind that the issue was whether he had forged paintings attributed to John Singer Sargent with

his own hands. The Circuit Court's argument is wrong factually and does not address the specific issue of the litigation.

In this case Justices of the District Court and Circuit Court in Massachusetts have expressed arbitrary and personal views which fail to conform to established law in this country. The Circuit Court also denied plaintiff's contention that the statute of limitations was tolled by defendant's concealment of its responsibility: "Since this action was brought in the district of Massachusetts, Massachusetts law determines the applicable statute of limitations." Plaintiff believes that contrarily the federal equitable rule that a statute of limitations

does not begin to run until the fraud has been discovered, which would be read into even an explicit federal statutory limitation, must also be read into the state limitations statute, where suit arises under Federal diversity jurisdiction (Bomar v. Keyes, C.C.A. 2d, 1947, 162 F 2d 136).

STATEMENT OF THE CASE

The material facts of the case are that plaintiff is an obscure artist specializing in portraits who also has written scholarly biographies and articles on several artists, and who is honorable and above reproach in every respect. For twenty years and more plaintiff has been

the object of unremitting personal attacks and allegations of criminal acts emanating from THE BOSTON ATHENAEUM. They are product of a single employee: an unstable, homosexual, and uneducated librarian, David K.M. McKibbin, who, by this means, attempted to make himself the sole "expert" on the artist John Singer Sargent. Plaintiff in 1955 published a massive 464-page biography of this artist to which is appended a catalogue raisonne of his work. Recently it has been discovered by means of letters disclosed pursuant to an Order for Discovery signed by Hon. Lee F. Gagliardi, Justice of the United States District Court for the Southern District of New York, that David K.M. McKibbin received from THE BOOK OF THE MONTH CLUB

in July 1955 the complete proofs of plaintiff's work. McKibbin was therefore able to plagiarize it at leisure for a 30-page pamphlet entitled SARGENT'S BOSTON, in which the sequence of matters, sentences, and words, follow plaintiff's.*

With respect to the bizarre allegations put forth by David K.M. McKibbin in the name and on the stationery of THE BOSTON ATHENAEUM the essential matter is that even after they escalated from ad hominem attacks on plaintiff's scholarship and ethics, and became allegations of criminal acts, they never reached plaintiff himself. A major reason for

*Litigation concerning this newly discovered copyright infringement on the part of McKibbin is now before the District Court, Southern District of New York (75 Civ. 6474).

this must be that after publication of his own volume plaintiff became the youngest person ever to be honored by grant of a Guggenheim Fellowship. Announced in April 1956, when he was 27, this Fellowship in art history was the cause plaintiff took up residence in Europe where he married and concentrated on his career painting portraits and wrote his further scholarly volumes on Gilbert Stuart (1964) and Claude Monet (1966).* No "controversy" in the sense understood by Justice Powell existed publicly between McKibbin and plaintiff. Instead, continuous furtive

*No parallel allegations concerning plaintiff's scholarship or ethics, nor claim of criminal acts, ever has arisen with respect to his work on Stuart or Monet. The obvious reason is that McKibbin has not tried to make himself an "expert" in these areas also.

allegations of criminal acts emanated from THE BOSTON ATHENAEUM against plaintiff. Plaintiff, who lived far off in Europe, remained ignorant and could not reply. No contrary evidence has been presented.

On the basis of his continuous allegations against plaintiff and with no other publication to his credit than the 1956 plagiary of plaintiff's book on Sargent, in 1966 McKibbin secured a contract and advance payment of $5,000 from the National Gallery of Art, at Washington, to produce a definitive volume on the artist John Singer Sargent. At the same time he secured grant of a further $5,000 from the Chapelbrook Foundation, of Boston. Inevitably doubt must exist

whether McKibbin ever had the competence to execute this task. How he went about it is instructive, for he began by copying out extensive notes dictated by plaintiff at the Frick Art Reference Library in New York. After that he penetrated the closed files of the Tate Gallery (London) and the Ashmolean Museum (Oxford) where McKibbin also copied plaintiff's private letters written in an advisory capacity while he contributed to the catalogues of these two museums. For nine years McKibbin nonetheless failed to deliver any manuscript. In January 1975 McKibbin's contract was unilaterally cancelled by the National Gallery of Art, which courteously undertook to inform plaintiff of its action by letter.

The National Gallery's letter to plaintiff was recognition that he is an aggrieved party. The National Gallery is aware that immediately on signing of its contract in 1966 David K.M. McKibbin began to employ its name. For eighteen months McKibbin organized anonymous publication in a newspaper of the allegations of criminal acts which he had been making furtively since 1955. First McKibbin recruited Richard Ormond,* employee, in a minor capacity, of a London museum.

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*Ormond intended to profit personally. It has been shown in separate proceedings (Mount v. Harper & Row, Inc., S.D.N.Y., 73 Civ. 3794) that in the confusion following publication of the libels Ormond seized the whole of plaintiff's writings on the artist John Singer Sargent to which he put his own name. Plaintiff received $12,500 damages, of which Hon. Lee F. Gagliardi took judicial notice December 3, 1975.

Through Ormond a London journalist, Denys Sutton, part of whose trade is to deal in unsavory items, was passed the sum total of McKibbin's hallucinatory allegations. It would appear that Sutton actually was given access to the same letters from THE BOSTON ATHENAEUM which later were disclosed by Order.

Denys Sutton arranged McKibbin's materials into a lively article on four sheets of paper which even contained a fictionalized account of a visit to plaintiff's large free-standing house in Dublin (Ireland), which, by Sutton's imaginative approach, became "a rented apartment." September 16, 1967, Sutton sold his work to THE SUNDAY TIMES (of London)* which

*Two days earlier Sutton had sold the

the following day published it on the front page of its massive Sunday edition under false claim that the article represented the investigation of the newspaper's own INSIGHT staff. This deliberate concealment of instigation by THE BOSTON ATHENAEUM, Richard Ormond, and Denys Sutton, plus the years of further concealment by which THE BOSTON ATHENAEUM successfully hid its responsibility, tolls the statute with respect to THE BOSTON ATHENAEUM.

The text published by THE SUNDAY TIMES (of London) immediately reached THE NEW YORK TIMES whose staff sought confirmation from "authority," and telephoned

same article to John Rydon, Art Editor of THE DAILY EXPRESS, who refused to publish because it could not be verified.

THE BOSTON ATHENAEUM where McKibbin confirmed that the matters published were true. At no time did he admit his own responsibility for creation of those matters. Next day the libelous article was reprinted in THE NEW YORK TIMES with addition of fresh allegations. Three days later the newspaper returned to the story with fresh allegations of criminal acts.

Actual publication of the libelous article constituted the first indication to plaintiff that any "forgeries" controversy existed or that allegation of criminal acts had been made against him. Because he then lived in Dublin, Ireland, he immediately brought suit there against the newspaper under its company name TIMES NEWSPAPERS LIMITED. Evidence plaintiff

later secured by Discovery Order shows that at this juncture the newspaper turned to THE BOSTON ATHENAEUM direct, as ultimate source of all published allegations. An attorney who is General Counsel for the newspaper flew <u>without notice</u> from London to Boston where, for four days, he badgered McKibbin without shaking an adamant refusal to testify or give deposition. Of documentary evidence there was none. TIMES NEWSPAPERS LIMITED found itself without defense.

Through a related company TIMES NEWSPAPERS LIMITED in August 1968 made contact with plaintiff with offer to re-publish his biography of the artist John Singer Sargent. This fresh edition appeared in November 1969. By the moment of publica-

tion, however, plaintiff had been two years without earned income and because of the added burden of domestic problems had left Ireland to return to his native New York. In May 1970 the case before the Irish Court was dismissed for plaintiff's inability to give £3,500 (at that time about $10,000) security for costs.

Plaintiff was met by hostile reception in New York and remained unable to earn a living or support his family, a circumstance which also deprived him of funds to undertake litigation in this country. Moreover the allegations were reiterated in the book ART FAKES IN AMERICA, published late in 1973 by The Viking Press, Inc., Publishers, of New York, which had submitted its manuscript to THE

BOSTON ATHENAEUM where McKibbin wrote and signed a verification across the top of a page. This book also contained fresh allegations not a part of the original libelous article. Plaintiff, who is not a lawyer, brought suit pro se against The Viking Press, Inc., before the Supreme Court of the State of New York, County of Queens. Despite overwhelming evidence of libel, his complaint twice was dismissed on the same basis that he is a "public figure." Plaintiff's petition to the Appellate Division of the Supreme Court of the State of New York that he be allowed to seek review in forma pauperis was denied without comment December 31, 1975. Ultimately this claim against Viking was settled by payment of a four figure sum

in damages.

* * *

Because THE BOSTON ATHENAEUM was the party which originated wholly unfounded allegations against plaintiff, no question of privilege can arise in litigation where it is the defendant. By the Discovery Order signed by Hon. Lee F. Gagliardi (Mount v. Harper, 73 Civ. 3794), masses of letters on stationery of THE BOSTON ATHENAEUM came into plaintiff's possession. These letters contained clear "knowledge of falsity" and "reckless disregard for the truth" and showed McKibbin at work promoting his scheme of anonymous publication. Knowledge of falsity and reckless disregard for truth eliminated any question whether or not plaintiff was a

public figure. By Gertz v. Welch he could make recovery of actual damages for libel against THE BOSTON ATHENAEUM.

Plaintiff filed complaint in the District Court at Boston, October 17, 1974, and, November 5, 1974, served motion for summary judgment. Defendant appealed to TIMES NEWSPAPERS (of London), from which it holds an indemnity illegal in the law of England where "a contract to indemnify another against the consequences of committing a tort is unlawful" (Salmond on the Law of Torts, Fourteenth Edition, London, 1965, page 640). TIMES NEWSPAPERS nonetheless retained in behalf of defendant the attorneys Robert D. Canty and John D. Hanify of the law firm Gaston Snow & Ely Bartlett, whom, on June 11,

1975, filed (1) Defendant's Opposition to Plaintiff's Motion for Summary Judgment, (2) Defendant's Memorandum in Support of Its Motion to Dismiss, and (3) the Affidavit of Rodney Armstrong. By Memorandum and Order of Hon. Joseph L. Tauro, District Judge, signed July 25, 1975, plaintiff's complaint was dismissed on the ground he was a public figure. On the same date Judge Tauro also signed Order to impound plaintiff's moving affidavit without giving reason for same.

Plaintiff served Notice of Appeal to the United States Court of Appeals for the First Circuit July 28, 1975, attached to which was motion to Proceed on Appeal in forma pauperis. Order to Let the Applicant Proceed was signed by Hon.

Joseph J. Tauro August 28, 1975, and plaintiff's Brief was forwarded to the Clerk of the court, October 10, 1975, followed by defendant's undated Brief. Plaintiff's reply brief was forwarded to the Clerk of the court November 14, 1975. By Decision dated February 25, 1976, and marked "not for publication," Chief Judge Coffin affirmed the finding of the District Court that plaintiff is a public figure. His decision failed to discuss the evidence of actual malice and reckless disregard for truth.

REASONS FOR GRANTING THE WRIT

The lower courts have refused to recognize the standards set up in Elmer Gertz

v. Robert Welch, Inc., for their guidance, and they have prevented publication of their actions. Because District Court and Circuit Court have employed a separate standard, unrelated to any developed by the United States Supreme Court, plaintiff has been denied recovery of actual damages to which he is entitled. Plaintiff has been singled out from the multitudes of libel plaintiffs to be denied the equal protection of the laws and the due process guaranteed him by the Constitution. No single plaintiff can be made an exception to the body of laws established in this country for the protection of all, and such grievance can be dealt with only by the United States Supreme Court.

DATED: Neponsit, Queens County, N.Y.
March 22, 1977

Respectfully submitted,

CHARLES MERRILL MOUNT
Plaintiff Pro Se

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CHARLES MERRILL MOUNT
Plaintiff

V CA 74-4837-T

THE BOSTON ATHENAEUM
Defendant

ORDER OF DISMISSAL

July 25, 1975

TAURO, D.J.

In accordance with the Court's Memorandum and Order entered this date, IT IS ORDERED that the complaint be, and it hereby is dismissed.

By the Court,

/s/ Daniel T. Lough III

Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CHARLES MERRILL MOUNT Plaintiff	
V.	CIVIL ACTION NO. 74-4837-T
THE BOSTON ATHENAEUM Defendant	

MEMORANDUM AND ORDER

TAURO, D.J. July 25, 1975

This is an action for libel brought in federal court on the basis of diversity of citizenship. The complaint alleges that defendant, as employer of David McKibbin, caused false charges of forgery to be made against plaintiff. The complaint further alleges that these false charges were published in The Sunday Times of London on September 17, 1967;

The New York Times on September 19, 1967; and in a book, Art Fakes in America, written by David L. Goodrich, and published by The Viking Press in November 1973.

Plaintiff moved for summary judgment; defendant filed a motion to dismiss. Since matters outside the pleadings were submitted by both parties, pursuant to Rule 12(B), the court treats defendants' motion to dismiss as a motion for summary judgment.

The articles in the London Times and in the New York Times, attached to the complaint, were not written by the defendant nor do they quote either the defendant or David McKibbin. The articles were published in 1967 and this complaint was filed in October 1974. Wholly apart from

the fact that allegations regarding these publications do not state a claim against the defendant, the libel action based on these publications is clearly barred by any applicable statute of limitations.

The third publication that plaintiff asserts as a basis for this libel action is the book, Art Fakes in America. The relevant page of the book recounts the basic story that was previously published in these newspapers. A draft copy of that book was sent to McKibbin for his review and comments. McKibbin returned that draft to the author with the following notation written across the top of the manuscript page:

> "I can't fault you on this. Do you think you might say about Mount that you are quoting the Times or whatever paper. David."

Even assuming that this statement written to the author constitutes a publication, as a matter of law, the statement simply is not libel. The statement constitutes merely an acknowledgment of the existence of previous publications of which both the author and the commentator, McKibbin, were aware. See Restatement (Second) of Torts § 566, comment (3) (Tent. Draft No. 21 April 5, 1975).

In previous litigation concerning this same book, the Supreme Court of New York held that plaintiff was a public figure and held that plaintiff had made no showing of actual malice by Viking Press in the publication of Art Fakes in America. Accordingly, the court granted defendant's motion for summary judgment.

Mount v. Viking Press Inc., No. 7036/74 (N.Y. Sup. Ct. Sept. 16, 1974). By established principles of collateral estoppel, plaintiff is bound by that court's determination that he "is a public figure at least within a limited range of issues, including the authenticity of works by John Singer Sargent which is the subject of the alleged libel." Slip. op. at 2-3. Plaintiff's affidavits filed in this case give ample support to the conclusion that plaintiff is a public figure, at least within this sphere of the art world. Indeed, the London Times article attached to plaintiff's complaint states:

> "Mr. Mount has, since the publication of [Sargent's] biography, enjoyed a world-wide audience for his opinions. Until the current debacle he was regarded as the ultimate authority on

> Sargent and his paintings, and was widely consulted by leading auction rooms all over the world."

Defamatory statements against public officials or public figures are actionable only if made by the publisher with actual malice, i.e., with knowledge that the statements are false or with reckless disregard for whether or not they are false. Gertz v. Welch, 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Despite the voluminous affidavits filed in support of his motion for summary judgment, plaintiff has failed to demonstrate that McKibben's hand-written comment was made either with actual malice or with reckless disregard for its truth or falsity. There has been a previous determination that the story,

as published in the book, did not constitute libel and was not published with actual malice. McKibben's hand-written comment on the draft is even more innocuous since it was only an acknowledgment that the author had correctly recounted the stories previously published by newspapers.

Since defendant's motion for summary judgment must be granted for the reasons stated above, there is no occasion for this court to deal with defendant's additional defenses which include defendant's lack of supervision or control over McKibbin's actions in that the review of the manuscript was not part of his employment at the Athenaeum, the statute of limitations, and a claim that the action

is barred because of a general release previously executed by plaintiff.

Plaintiff's motion for summary judgment is denied. Treating defendant's motion to dismiss as a motion for summary judgment, the motion is granted. The case is hereby ordered dismissed.

/s/ J. H. F. Tauro
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1334

CHARLES MERRILL MOUNT,
Plaintiff, Appellant,
v.
THE BOSTON ATHENAEUM,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro,
U.S. District Judge]

Before Coffin, Chief Judge,
and McEntee, Circuit Judge.

Charles Merrill Mount on brief pro se.
Robert D. Canty, John D. Hanify, and Gaston, Snow & Ely Bartlett on brief for appellee.

February 25, 1976

COFFIN, Chief Judge. Plaintiff, Charles Merrill Mount, appeals from the district court's grant of summary judgment for defendant, the Boston Athenaeum, in this libel action. Plaintiff, who instituted this action on October 17, 1974, alleged that defendant, as employer of David McKibbin, had caused false charges of forgery to be made against plaintiff. These allegedly false charges appeared in the Sunday Times of London on September 17, 1967, in the New York Times on September 19, 1967, and in a book, Art Fakes in America, written by David L. Goodrich and published by the Viking Press in November, 1973. The district court concluded that defendant's acts could not provide the basis for a libel action. It reasoned,

first, that whatever defendant's role was in the publication of the 1967 newspaper stories, plaintiff's claim was barred by any applicable statute of limitations and, second, that any claim based on the statements McKibbin made in connection with the publication of the book Art Fakes in America must fail because the statements were not libelous and were constitutionally protected. We affirm.

Plaintiff maintains that the cause of action based upon the 1967 newspaper stories should be measured by the English statute of limitations, which he states is six years, since the cause of action arose in England. Although six years passed between the alleged libel and the institution of the present action, he

contends that there is no bar to this action since either the limitation period was tolled by defendant's concealment of its responsibility or it began running anew after Art Fakes in America was published. We disagree. Since this action was brought in the district of Massachusetts, Massachusetts law determines the applicable statute of limitations. Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Mfg. Co., Inc., 313 U.S. 487 (1941). Even if the cause of action did arise in England, a Massachusetts court would apply the three year statute of limitations of M.G.L. ch. 260 § 4. See Clark v. Pierce, 215 Mass. 552, 553, 102 N.E. 1094 (1913); Bonsant v. Rugo, 190 F. Supp. 958 (D. Mass. 1961).

The record contains no evidence of the type of concealment that would have tolled this limitation period. See M.G.L. ch. 260 § 12; Connelly v. Bartlett, 286 Mass. 311; 190 N.E. 799 (1934). Nor did the publication of the book Art Fakes in America revive the cause of action based on the 1967 newspaper stories. Thus the district court was clearly correct.

The basis for plaintiff's final claim is that McKibbin made a libelous statement in connection with the publication of the book Art Fakes in America. McKibbin had received a draft copy of this book and had written across the top of the page that recounted the story that had previously appeared in the newspapers

in 1967:

> "I can't fault you on this. Do you think you might say about Mount that you are quoting the Times or whatever paper. David."

We think it is doubtful that this statement constituted a publication of defamatory material. It merely acknowledged the existence of previous publications of which both McKibbin and Goodrich were aware. McKibbin's communication per se did no further damage to plaintiff's reputation. Cf. Restatement (Second) of Torts § 566, comment (3) (Tent. Draft No. 21 April 5, 1975), § 559 comment (a) (Tent. Draft No. 20 April 25, 1974). We need not, however, rest our decision on this ground. Plaintiff was a public figure within the limited range of issues including the authenticity of the works of John

Singer Sargent.* His claim, therefore, cannot succeed since he failed to demonstrate that McKibbin's remark was made either with actual malice or with reckless disregard for its truth or falsity. See New York Times v. Sullivan, 376 U.S. 254 (1964).

Affirmed.

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*The record contains ample support for the conclusion that plaintiff is a public figure within the art world; indeed, his own admissions in his affidavits may provide a sufficient basis for this conclusion. The district court, however, did not have to make a finding on this point. In previous litigation concerning this book, the Supreme Court of New York held that plaintiff was a public figure for purposes of this litigation. Mount v. Viking Press, Inc., No. 7036/74 (N.Y. Sup. Ct. Sept. 16, 1974). Since plaintiff was the party against whom the New York court's determination was made, that determination has a collateral estoppel effect in the present proceeding. Cardillo v. Zyla, 486 F.2d 473, 475 (1st Cir. 1973). Although plaintiff is attempting to collaterally attack the New York judgment, it will have a collateral estoppel effect in this proceeding as long as it remains unreversed by a proper tribunal. Id.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHARLES MERRILL MOUNT,	:	
Plaintiff-Appellant,	:	NOTICE OF APPEAL
-against-	:	
THE BOSTON ATHENAEUM,	:	No. 75-1334
Defendant-Appellee.	:	

PLEASE TAKE NOTICE that the above named Plaintiff-Appellant hereby appeals to the UNITED STATES SUPREME COURT from the Order of the United States Court of Appeals for The First Circuit, in the above entitled action, filed and entered in the office of the Clerk on the 25th day of February, 1975.

DATED: Neponsit, New York
February 27, 1976.

/s/ Charles Merrill Mount

CHARLES MERRILL MOUNT
Plaintiff-Appellant pro se
230 Beach 146 Street
Neponsit, New York, 11694
(212) 945-1279

TO: Robert D. Canty
John D. Hanify
Gaston, Snow & Ely Bartlett
82 Devonshire Street
Boston, Mass., 02109

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1317

CHARLES MERRILL MOUNT,
Petitioner,
v.
THE BOSTON ATHENAEUM,
Respondent.

Memorandum of Respondent in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

DANIEL B. BICKFORD
GASTON SNOW & ELY BARTLETT
One Federal Street
Boston, Massachusetts 02110
(617) 426-4600
Counsel for Respondent

TILLMA ASSOCIATES, INC., LEGAL PRINTERS, BOSTON

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1317

CHARLES MERRILL MOUNT, *Petitioner,*

v.

THE BOSTON ATHENAEUM, *Respondent.*

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

Respondent represents to the Court as follows:

1. The above-entitled cause was submitted on December 3, 1975 and an opinion rendered and judgment entered for this Respondent on February 25, 1976 by the United States Court of Appeals for the First Circuit.

2. The Petition for Writ of Certiorari was filed with this Court on March 24, 1977, more than ninety days since the entry of judgment by the court of appeals, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101(c) and Rule 22 of this Court).

THEREFORE, it appears that petitioner's application for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

DANIEL B. BICKFORD
GASTON SNOW & ELY BARTLETT
One Federal Street
Boston, Massachusetts 02110
(617) 426-4600
Counsel for Respondent

CERTIFICATE OF SERVICE.

I, Daniel B. Bickford, hereby certify that on this 20th day of April, 1977 three copies of the Respondent's Memorandum in Opposition to the Petition for Writ of Certiorari were mailed by first-class mail, postage pre-paid, to Charles Merrill Mount, 230 Beach 146 Street, Neponsit, New York 11694, Counsel Pro Se.

DANIEL B. BICKFORD
GASTON SNOW & ELY BARTLETT
One Federal Street
Boston, Massachusetts 02110
(617) 426-4600
Counsel for Respondent

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1317

CHARLES MERRILL MOUNT,

Plaintiff,

v.

THE BOSTON ATHENAEUM,

Defendant.

PETITIONER'S REPLY BRIEF

CHARLES MERRILL MOUNT
Plaintiff Pro Se
230 Beach 146 Street
Neponsit, New York 11694
(212) 945-1279

(6313)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No.

CHARLES MERRILL MOUNT,

Plaintiff,

v.

THE BOSTON ATHENAEUM,

Defendant.

PETITIONER'S REPLY BRIEF

INTRODUCTION

Compelling reason exists why the court should exercise its established discretion to review this matter. Upon

it depends whether ever again a scholar in this country can be safe from the proved means of destroying his honorable career here employed - the unscrupulous and unlawful use of deliberate or hallucinatory libels, and allegations of criminal acts, directed at an obscure award-winning scholar by an unstable, uneducated, self-appointed "colleague". The present notorious matter is surely the greatest hoax ever perpetrated upon the scholarly community. Were the Supreme Court to leave such flagrant abuse unchecked, a proven path to destroy every esteemed scholar would be declared open. Endless repetitions must henceforth decimate learning until it rested in the hands of those able to invent the biggest lies and

unscrupulously feed them to newspapers. At stake here is not one scholar, however significant his little contribution, but the sanctity and validity of scholarship as a pursuit, and the human capacity to push forward the frontiers of understanding.

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI

As was previously the circumstance before the District Court and Circuit Court, Respondent is unable to deny the facts of his world-wide hoax, nor substantiate the allegations of criminal acts flung at plaintiff across the front-pages of newspapers. He cannot deny that the party responsible for these hallucinations,

David K.M. McKibbin, is probably insane. Reality is an embarrassment to Respondent, who prefers not to notice. Respondent's Memorandum instead attempts to persuade this august body to approve his squalid transactions on the technicality "that petitioner's application for a writ of certiorari is out of time and should be denied." No other answer is made.

PETITIONER'S REPLY

The facts, already made known to the court through correspondence between Petitioner and the Clerk, and hereto annexed as APPENDICES A, B, C, and D, are that in good time on February 27, 1976, Petitioner filed Notice of Appeal to the United States

Supreme Court from the Order entered in the First Circuit on February 25, 1976. Respondent fails to mention this Notice of Appeal, filed two days after the Order, and its timeliness cannot be disputed. Notice of Appeal satisfies the requirements for timeliness of Title 28, Section 2102(c), which states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. (emphasis supplied)

The Clerk of the Court of Appeals for the First Circuit on March 2, 1976, forwarded a certified copy of Petitioner's Notice of Appeal to Michael Rodak, Esquire, Clerk of the United States Supreme Court,

together with covering letter herewith annexed as APPENDIX A. This letter ends: "Will you kindly acknowledge receipt of the above on the enclosed copy of this letter." As a pro se petitioner, for nine years deprived of earned income through operation of the libels complained of, petitioner surely had every right to believe that he had satisfied the requirements of Title 28, Section 2101(c), by having "applied for" Appeal by Certiorari to the Supreme Court within the 90 days stipulated by statute.

At the moment Petitioner "applied for" review by this court he was impoverished, his mother blind, his father and aunt at death's door, and he was daily occupied to provide food and care for his

twelve-year-old son, whom, like himself, in these horrendous domestic circumstances had been abandoned by his mother. April 26, 1976, Petitioner's aunt died, and, following her funeral, his father was transported by ambulance to hospital, where, on May 29, he too passed away. These heavy burdens of family responsibility made all other matters beyond Petitioner's capacity. Through all the anxieties and deprivations of this period Petitioner relied upon the firm belief that he had satisfied statutory provisions to safeguard his Petition to the United States Supreme Court. Prior law supports this belief, for the act of March 3, 1891, purposely allowed one year for taking the appeal, and Matton Steamboat Co. v. Murphy,

N.Y. 1943, 63 S.Ct. 1126, 319 U.S. 412, 87 L.Ed. 1483, turns upon such "application" as Petitioner had made by filing the acknowledged Notice of Appeal. Petitioner's omission, during this same difficult period, to apply for an extension of time arises from his pro se inexperience, his confidence that all statutory requirements already were satisfied, and that in his letter dated February 9, 1977 (APPENDIX C) Edward C. Schade, Assistant Clerk, relieved Petitioner by stating the court's willingness to accept the petition: "However, this office would docket your petition for writ of certiorari with a notation as to its untimely receipt." To pro se Petitioner this read as though it was assurance of his day in court.

THE COURT HAS DISCRETION TO REVIEW

Much thought has been given the question of timeliness. This present matter, wherein a pro se petitioner believed himself to have satisfied statutory requirements by filing his Notice of Appeal, which Notice of Appeal was acknowledged by the Circuit Court and tendered in certified copy to the Supreme Court, is consistent with enlightened thought. Professor Charles Alan Wright states in his Handbook of the Law of Federal Courts (West Publishing Co., St. Paul, 1970): "The time limits for seeking Supreme Court review have commonly been thought to be jurisdictional, though it has been argued persuasively that review should

not be barred if the delay was wholly caused by circumstances entirely beyond the applicant's control." Teague v. Regional Commissioner of Customs, 1969, 89 S.Ct. 1457, 1460-1463, 394 U.S. 977, 981, 984, 22 L.Ed. 2d 756. Significantly, Professor Wright finds that lack of timeliness is no bar. "The court may dismiss an appeal if it is not docketed within the time allowed by the rules, but it is not required to do so and may overlook the defect if it chooses." Johnson v. Florida, 1968, 88 S.Ct. 1713, 1714 n, 391 U.S. 596, 598 n, 20 L.Ed. 2d 838.

ARGUMENT

Compelling reason exists why the

discretion of the court should be exercised to review this matter, wherein a pro se petitioner believed himself to have satisfied the statutory requirements of timeliness, and, if he did not, "the delay was wholly caused by circumstances entirely beyond the applicant's control." An over-riding national interest requires this. Were this court to give even tacit approval to the destruction of honorable scholarly careers through the unlawful means admittedly employed by the Respondent herein, the sanctity and validity of scholarship as a pursuit must disappear and learning must be left to those unstable persons able to hoax the nation by the biggest lies unscrupulously spread to newspapers.

CONCLUSION

The court should exercise its established discretion to "overlook the defect" if one exists.

Dated: Neponsit, Queens County, N.Y.
April 28, 1977

Respectfully submitted,

CHARLES MERRILL MOUNT
Petitioner Pro Se

APPENDIX A

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANA H. GALLUP
CLERK

1602 John W. McCormack
Post Office and Courthouse
Boston, Mass. 02109
(617) 223-2888

March 2, 1976

Michael Rodak, Esquire
Clerk, U.S. Supreme Court
Supreme Court Building
Washington, D. C. 20554

No. 75-1334. Mount v. The Boston Athenaeum

Dear Mr. Rodak:

Enclosed is a copy of a document captioned notice of appeal. Without passing upon the propriety of filing a notice of appeal, I enclose a certified copy of that document.

Will you kindly acknowledge receipt of the above on the enclosed copy of this letter.

Sincerely yours,

/s/ Dana H. Gallup
Clerk.

DHG:gvc
Enclosure

cc: Mr. Charles M. Mount
230 Beach 146 Street
Neponsit, New York 11694

Robert D. Canty, Esquire
82 Devonshire Street
Boston, Massachusetts 02109

APPENDIX B

Charles M. Mount
230 Beach 146 Street
Neponsit, New York, 11694

January 21, 1977

The Clerk
Supreme Court of the United States
Washington, D.C., 20543

Dear Sir,

February 27, 1976 I filed Notice of Appeal to the United States Supreme Court from the Order of the Court of Appeals for the First Circuit entered on the 25 of February. At that time I still suffered from a lengthy illness and my preoccupation was increased during the year by the twin deaths of my father and aunt. I now write in haste to enquire of you the very latest date on which my petition for writ of certiorari could be filed, and whether, in view of the extraordinary circumstances outlined above, there is any provision in the rules for an extension of time.

My good friend the attorney Nathan Korn, a Member of the Bar in both New York and Massachusetts, whom also has been admitted to practice before the United States Supreme Court, has taken an interest in my affairs and there is some possibility that he may wish to present the writ in my behalf. Relations between Mr. Korn and myself are informal. He asks me to

enquire whether his intervention in any way would be hampered by the fact that previously I acted in this matter pro se and that my Appeal to the First Circuit was conducted in forma pauperis.

Sincerely,

Charles M. Mount

cc: Robert D. Canty
Nathan Korn.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 9, 1977

Mr. Charles M. Mount
230 Beach 146 Street
Neponsit, New York 11694

Dear Mr. Mount:

You had until May 25, 1976 in which to file an appeal or a petition for writ of certiorari to this Court. You may not obtain an extension of time at the present due to the expiration of time.

However, this office would docket your petition for writ of certiorari with a notation as to its untimely receipt.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ Edward C. Schade

Edward C. Schade,
Assistant Clerk

olt

APPENDIX D

Charles M. Mount
230 Beach 146 Street
Neponsit, New York, 11694

March 21, 1977

Mr. Edward C. Schade
Assistant Clerk
Supreme Court of the United States
Washington, D.C., 20543

Dear Mr. Schade,

In conformity with the terms of your letter dated February 9 the Counsel Press herewith forwards to you in my behalf forty copies of my petition for writ of certiorari and a bank check for one hundred dollars ($100.) as filing fee. Because of the short time available to us the attorney who will argue this case, Nathan Korn, has sought to make use of my greater familiarity with this matter by asking me to draft the petition myself. He has read it through in draft form.

Please permit me to stress once more that tardiness in filing this petition arises from unfortunate circumstances. Last April 26 my aunt died, followed within a month by my father. One whole side of my family was extinguished. Problems thrust on me were made more difficult by being left to care for my aged and nearly blind mother. For many months there was no hope I could give attention to anything else, but, also, it was in

the back of my mind that having filed timely notice of appeal with the Circuit Court I would have a year in which to present this petition as in the state courts where my appeals previously were lodged.

Sincerely,

cc. Nathan Korn

/s/ Charles M. Mount